Subramaniam a/l Paramasivam v Courts Mammoth Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO SI–23–64 OF 2005
ABDUL WAHAB PATAIL J
11 MARCH 2010

Civil Procedure — Action — Cause of action — Defamation action — Defence of qualified privilege raised by defendants — Malice alleged by plaintiff — Whether plaintiff obliged to give particulars of facts and matters establishing malice — Rules of the High Court 1980 O 78 r 3

Tort — Defamation — Libel — Elements of — Publication of defamatory words to staff of recipient or sender of defamatory communication — Whether sufficient to constitute publication of defamatory words to third party

Tort — Defamation — Qualified privilege — Letter of complaint sent to Advocates & Solicitors' Disciplinary Board by client — Complaint later dismissed by board — Whether bona fide complaint established at time complaint made — Whether letter would ground action in defamation — Whether letter protected by qualified privilege

The plaintiff — an advocate and solicitor — sued his former clients ('the defendants') for defamation. The plaintiff's action was based on words or innuendos contained in a letter of termination issued by the first defendant's solicitor and in a letter of complaint issued by the first defendant to the Advocates & Solicitors' Disciplinary Board ('the board'). The complaint was subsequently dismissed by the board. The defendants pleaded the defences of qualified privilege and justification.

Held, dismissing the plaintiff's action with costs:

(1) There are three initial elements to an action in defamation. The first is whether the words by their natural and ordinary meaning or by innuendo are capable of being defamatory. The second is whether the words refer to the plaintiff. The third is whether the words were published to a third party. Only if these elements are established, can it be said that prima facie, the words are defamatory of the plaintiff. Only then would it become necessary to consider the defences and the plaintiff's answers thereto (see para 2).

(2) In the instant case, the words and innuendos in the letter of termination and the letter of complaint were clearly capable of being defamatory. The words referred to the plaintiff and defamed him as an advocate and solicitor. With regard to the publication of defamatory words to third parties, staff of the recipient or sender of a defamatory communication are not such third parties. Thus in the instant case, there was no publication to a third party when the letter of termination was read by the plaintiff's staff. Consequently, there was no cause of action in defamation. However, there was prima facie publication to a third party in respect of the letter of complaint sent to the board (see paras 2 & 9–11).

(3) The board is the body to which complaints by clients of advocates and solicitors are referred to. The letter of complaint to the board was thus protected by qualified privilege (see para 12); *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173 (SC) followed.

(4) Where the plaintiff disputes the defence of privilege on the grounds of malice, the plaintiff must under O 78 r 3 of the Rules of the High Court 1980 ('RHC') serve a reply giving particulars of the facts and matters from which the malice is to be inferred. This is because malice negates the defence of privilege and to estop the defendant from claiming it was taken by surprise and then to seek to dismiss the plaintiff's claim of malice. If the particular facts relied upon to establish malice have not been set out, the defendant would have no opportunity to verify the truth and accuracy of those particular facts, and if not true and correct, in what manner they are not true and not correct (see paras 14–15).

(5) In the instant case, the plaintiff had failed to file a reply as required by O 78 r 3 of the RHC, though he relied on para 18 of his statement of claim wherein malice was alleged. However, it was clear from para 18 that no particulars of facts from which malice could be inferred had been set out. The plaintiff had thus failed to successfully invoke malice as an answer to the defence of privilege (see paras 19–21).

(6) There is no cause of action in defamation where a bona fide complaint made to a professional disciplinary authority against a professional is dismissed. The threat of litigation would only intimidate persons with bona fide complaints from making a complaint, and deny members of the public their right of protection from unprofessional professionals. In the instant case, the defendants did have a bona fide grievance when they issued the letter of termination and the letter of complaint. It was thus not necessary to consider the defence of justification (see paras 25 & 29–30).

[Bahasa Malaysia summary

Plaintif — seorang peguambela dan peguamcara — menyaman anak guam-anak guamnya dahulu ('defendan-defendan') atas fitnah. Tindakan

plaintif berdasarkan ayat-ayat atau sindiran-sindiran yang terkandung dalam surat penamatan yang ditulis oleh peguamcara defendan pertama dan dalam surat aduan yang ditulis oleh defendan pertama kepada Lembaga Tatatertib Peguambela & Peguamcara ('Lembaga tersebut'). Aduan itu kemudiannya ditolak oleh Lembaga tersebut. Defendan-defendan memplidkan pembelaan perlindungan bersyarat dan justifikasi.

Diputuskan, menolak tindakan plaintif dengan kos:

(1) Terdapat tiga unsur permulaan bagi satu tindakan fitnah. Pertama ialah sama ada perkataan-perkataan tersebut dalam makna semulajadi dan biasa atau secara sindiran boleh menjadi fitnah. Kedua, sama ada perkataan-perkataan tersebut merujuk kepada plaintif. Ketiga, sama ada perkataan-perkataan tersebut diterbitkan kepada pihak ketiga. Hanya apabila unsur-unsur ini dibuktikan, baru boleh dikatakan bahawa prima facie perkataan-perkataan tersebut memfitnah plaintif. Hanya pada ketika itulah perlunya untuk mempertimbangkan pembelaan-pembelaan dan jawapan-jawapan plaintif (lihat perenggan 2).

(2) Dalam kes ini, perkataan-perkataan dan sindiran-sindiran dalam surat penamatan dan surat aduan adalah jelas boleh memfitnah. Perkataan-perkataan tersebut merujuk kepada plaintif dan memfitnahnya sebagai seorang peguambela dan peguamcara. Berkenaan penerbitan perkataan-perkataan memfitnah kepada pihak ketiga, pekerja penerima atau pengirim surat tersebut bukanlah pihak ketiga. Maka, dalam kes ini, tiada penerbitan kepada pihak ketiga apabila surat penamatan tersebut dibaca oleh pekerja plaintif. Oleh itu, tiada kausa tindakan untuk fitnah. Walau bagaimanapun, terdapat penerbitan prima facie kepada pihak ketiga berkaitan surat aduan dihantar kepada Lembaga tersebut (lihat perenggan 2 & 9–11).

(3) Lembaga tersebut adalah badan yang mana aduan-aduan oleh anak guam-anak guam peguambela dan peguamcara dirujuk. Surat aduan kepada Lembaga tersebut oleh itu dilindungi oleh perlindungan bersyarat (lihat perenggan 12–13); *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173 (MA) diikut.

(4) Apabila plaintif mempertikaikan pembelaan perlindungan bersyarat atas dasar niat jahat, plaintif mestilah, di bawah A 78 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') menyerahkan jawapan dengan memberikan butiran fakta-fakta dan hal-hal yang mana niat jahat tersebut disimpulkan. Ini kerana niat jahat menyangkal pembelaan perlindungan dan mengestop defendan menghujahkan ia dikejutkan dan kemudiannya memohon untuk menolak dakwaan niat jahat plaintif. Jika butiran yang dirujuk untuk membuktikan niat jahat tidak disediakan, defendan tidak berpeluang untuk mengesahkan kebenaran dan

ketepatannya, dan jika tidak benar dan tidak tepat, apakah yang tidak benar dan tidak tepat itu (lihat perenggan 14–15).

(5) Dalam kes ini, plaintif gagal memfailkan jawapan seperti yang dikehendaki oleh A 78 k 3 KMT, walaupun dia merujuk kepada perenggan 18 penyata tuntutannya yang mana dia mendakwa niat jahat. Namun, adalah jelas daripada perenggan 18 bahawa tiada butiran fakta di mana niat jahat tersebut boleh disimpulkan telah disediakan. Oleh itu, plaintif gagal menggunapakai niat jahat sebagai jawapan kepada pembelaan perlindungan tersebut (lihat perenggan 19–21).

(6) Tiada kausa tindakan dalam fitnah apabila aduan bona fide dibuat kepada pihak berkuasa tatatertib profesional terhadap seorang profesional ditolak. Gertakan untuk menghadapi litigasi hanya akan menakut-nakutkan orang yang mempunyai aduan bona fide daripada membuat aduan; dan menafikan orang awam akan hak mereka daripada dilindungi oleh profesional-profesional yang tidak profesional. Dalam kes ini, defendan-defendan mempunyai kilanan bona fide apabila mereka menulis surat penamatan dan surat aduan tersebut. Lantaran itu, tidak perlulah mempertimbangkan pembelaan justifikasi (lihat perenggan 25 & 29–30).]

Notes

For cases on cause of action, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 43–58.

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 369–527.

For cases on qualified privilege, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 576–590.

Cases referred to

Abdul Aziz bin Jelani & Anor v Peter Chua Swee Lai [2000] 2 MLJ 462, HC (refd)

Abu Samah bin Omar v Zainal bin Montel [2004] 5 MLJ 377; [2003] 1 LNS 501, HC (refd)

Chong Swee Huat & Anor v Lim Shian Ghee T/AL & G Consultants & Education Services [2009] 3 MLJ 665; [2009] 4 CLJ 113, CA (refd)

Henry Ong Keng Sem v Patrick Ong King Kok [2008] 7 MLJ 569; [2008] 4 CLJ 276, HC (refd)

Ismail bin Shamsudin v Abdul Aziz bin Abdan and other suits [2007] 3 MLJ 512; [2007] 8 CLJ 65, HC (refd)

Karthak v Damai [1962] MLJ 423, HC; [1962] 1 LNS 65 (refd)

Kian Lup Construction v Hongkong Bank Malaysia Bhd [2002] 7 MLJ 283; [2002] 7 CLJ 32, HC (refd)

Luk Kai Lam v Sim Ai Leng [1978] 1 MLJ 214; [1978] 1 LNS 110, FC (refd)

M Prabhkaran v Salam bin Seran [2001] 6 MLJ 368; [2001] 3 CLJ 615, HC (refd)

Matchplan (M) Sdn Bhd & Anor v William D Sinrich & Anor [2004] 2 MLJ 424; [2004] 1 CLJ 810, CA (refd)

Rajagopal v Rajan [1972] 1 MLJ 45; [1971] 1 LNS 117, FC (refd)

S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173; [1988] 1 CLJ 771, SC (folld)

Legislation referred to

Rules of the High Court 1980 O 78 r 3

Wan Idi Amin (P Sevam with him) (Adliza Subra & Partners) for the plaintiff.
Joy W Appukuttan (SK Yeoh & Partners) for the defendants.

Abdul Wahab Patail J:

[1] The plaintiff Subramaniam a/l Paramasivam, a barrister and solicitor, claims damages against the defendants, Courts Mammoth Bhd and Nicholas Alexander Elphick for defamation. The defendants were the plaintiff's former clients.

[2] There are three initial elements to an action in defamation. The first is whether the words by their natural and ordinary meaning (see *Chong Swee Huat & Anor v Lim Shian Ghee T/AL & G Consultants & Education Services* [2009] 3 MLJ 665; [2009] 4 CLJ 113 (CA)) or by innuendo (*Rajagopal v Rajan* [1972] 1 MLJ 45; [1971] 1 LNS 117 (FC); *Luk Kui Lam v Sim Ai Leng* [1978] 1 MLJ 214; [1978] 1 LNS 110 (FC)) is capable of being defamatory. The second is whether the words refer to the plaintiff. The third is whether the words were published to a third party. See *Henry Ong Keng Sem v Patrick Ong King Kok* [2008] 7 MLJ 569; [2008] 4 CLJ 276; *Ismail bin Shamsudin v Abdul Aziz bin Abdan and other suits* [2007] 3 MLJ 512; [2007] 8 CLJ 65; *Kian Lup Construction v Hongkong Bank Malaysia Bhd* [2002] 7 MLJ 283; [2002] 7 CLJ 32. Only if these elements are established, then it can be said that prima facie the words are defamatory of the plaintiff. Only then would it become necessary to consider the defences and the plaintiff's answers thereto.

[3] The claim is premised on words or innuendos contained in: (a) the first defendant's solicitor's letter of termination dated 17 February 2003, and (b) the first defendant's letter of complaint against the plaintiff to the Advocates & Solicitors Disciplinary Board dated 16 April 2004.

[4] In the letter of termination, the offending words were: 'Any and all money paid by COURTS to you with respect to the '226 files' which has been wrongfully apportioned, appropriated and/or expended'.

[5] In the letter of complaint, the words the plaintiff takes exception to the following: **A**

3. Nature of Misconduct

COURTS believes that Mr. Subramaniam is guilty of misconduct pursuant to Section 94(3) of the Legal Profession Act 1976 for the reason set out below **B**

3.1 Refusing to provide Courts with the status reports and statements of account

(c) Payment of money by COURTS Pursuant to the abovementioned Bills/Invoices, COURTS paid a total of RM 655,777-00 to Mr. Subramaniam and/or Messrs. Adliza Subra And Partners as follows: **C**

(d) Refusal to provide status report or statement of accounts

Notwithstanding COURTS' various request and demands, Mr. Subramaniam failed and refused to do the following: **D**

(i) Failed and refused to provide COURTS informed of the various Matters.

(ii) Failed and refused to provide accounts showing how money paid by COURTS have been apportioned, Subramaniam and/ or Messrs Adfiza Subra And Partners. **E**

(e) Demand for Status Report & Statement of Account

COURTS did through its solicitors' letter dated 22nd May 2003 demand from Mr. Subramaniam and Messrs Adliza Subra And Partners a written and complete status report of ail Matters ('Status Report') and a written and complete account of all money paid by COURTS to and received by Mr. Subramaniam and Messrs Adliza Subra & Partners ('Statement of Account'). **F**

(i) Instead of providing the Status Report and Statement of Account, Mr. Subramaniam and/ or Messrs Adliza Subra And Partners did via letters 26th May 2003, 29th May 2003 and 15th July 2003 refund RM 8,246-00 to COURTS. The particulars of the refund are sent out in Folio 3 of the Amended SOC (the relevant documents are found in the Complaint's Documents-Bundle C). **G**

(ii) Thereafter, Mr. Subramaniam and/ or Messrs Adliza Subra And Partners, did via a letter dated 20th August 2003 refund a further sum of RM422.50 to COURTS. **H**

(f) Continued refusal to provide status report or statement of accounts

However, Mr. Subramaniam and/or Messrs Adliza Subra And Partners continue to fail and refuse to provide COURTS with the Status Report and Statements of Account. **I**

3.2 Failure to exercise due diligence and/or provide proper legal service

(a) Wrongful conduct of court proceeding. Mr. Subramaniam and/or Messrs Adliza Subra & Partners has filed a suit for and on behalf of COURTS In

Johor Bahru Magistrate's Court with A/E No. 76-387-2001 against one Norashikin Binti Radzali.

(i) Suddenly, by a letter dated 28th May 2003, Mr. Subramaniam informs COURTS that the above suit has been discontinued or withdrawn 'at the advice of the court', (refer: Messrs Adliza Subra & Partners' letter dated 28th May 2003 set out in Complainant's Documents, Bundle C)

(ii) Mr. Subramaniam and/or Messrs Adliza Subra & Partners, have since failed and refused to explain the following:

- Why did a court of law advice lawyer with conduct to discontinue or withdraw the above matter?
- Why did a lawyer with conduct discontinue or withdraw the above matter without COURTS's approval, consent and instructions?

(b) Failure to provide any or any proper legal services

Notwithstanding that Mr. Subramaniam and/ or Messrs Adliza Subra & Partners" were appointed in 1999, they have never informed COURTS of even one single successful prosecution of Writ Seizure & Sales.

3.3 COURTS is denied information & knowledge of its own Matters

By reason of Mr. Subramaniam and/ or Messrs Adliza Subra & Partners continued failure and refusal to provide the Status Report and statement of Account, COURTS has no updated information and knowledge of its own Matters.

By reason of all the above, COURTS believes that Mr. Subramaniam has breached his duties and obligations to COURTS and is guilty of misconduct unbefitting of an advocate and solicitor, or which brings or is calculated to bring the legal profession into disrepute pursuant to Section 94(3)(o) of the Legal Profession Act 1976.

[6] The words in the letter of termination and the letter of complaint do not speak well of the plaintiff. The words, if pertaining to a person's reputation as an advocate and solicitor, a profession that demands of its members a reputation of integrity, particularly with regard to financial interests of their clients, is scandalous in nature. In the letter of termination, the words 'wrongfully apportioned, appropriated and/or expended' were used in relation to money. In the letter of complaint, the allegations were of refusal to provide status reports and statement of accounts, and extended to his conduct and practice which are wholly inappropriate of an advocate and solicitor and if accepted would expose him to disciplinary action. The words and innuendos are clearly capable of being defamatory.

[7] In both instances, the plaintiff is referred to by name. There is no suggestion the name was intended to refer to anyone else. There is no doubt the

words refer to the plaintiff. It is not disputed the plaintiff is an advocate and solicitor. The words are, therefore, defamatory in nature of the plaintiff as an advocate and solicitor.

[8] As to publication, the letter of termination was addressed to the plaintiff while the letter of complaint was addressed to the Director, Complaints Secretariat of the Advocates & Solicitors' Disciplinary Board.

[9] With written communications is inevitable staff of the sender and staff of the recipient would see the letter. However, even though such staff may not be directly involved in the writing and posting of the letter as well as the receipt and transmission to the recipient, they are nevertheless as staff are integral parts and parcel of the internal organisation. This court holds such staff are not third parties within the meaning of publication of an alleged defamation.

[10] In respect of the letter of termination, this court likewise holds that there had been no publication to a third party where the letter is read by staff of the plaintiff. Without publication to a third party, there is no cause of action in defamation (see *Matchplan (M) Sdn Bhd & Anor v William D Sinrich & Anor* [2004] 2 MLJ 424; [2004] 1 CLJ 810 (CA)).

[11] The letter of complaint was written by the defendants to the Advocates & Solicitors Disciplinary Board. There is prima facie therefore publication to a third party.

[12] The Advocates & Solicitors Disciplinary Board is, however, the body to whom complaints by their client about the professional conduct of an advocate and solicitor is by law referred to. The letter of complaint is thus a communication which is precisely within the occasion explained by the Supreme Court in *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173; [1988] 1 CLJ 771 (SC):

> However, there are occasions upon which, on grounds of public policy and convenience, a person may, without incurring legal liability, make statements about another which are defamatory and in fact untrue: *Watt v Longsdon* [1930] 1 KB 130. These occasions are called occasions of qualified privilege. A communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty although it contains a criminatory matter which, without this privilege, would be slanderous and actionable: *Harrison v Bush* (1885) 5 E & B 344; (1885) 119 ER 509. The duty may be legal, social or moral, and the person to whom the communication is made must have a corresponding interest or duty to receive it. The reciprocity is essential: *Adam v Ward* [1917] AC 309 at p 334.

[13] The defence of qualified privilege was pleaded by the defendants. The defence of qualified privilege was explained by the Supreme Court in *S Pakianathan v Jenni Ibrahim* as follows:

> The protection afforded by the law to a publication made on an occasion of qualified privilege is not an absolute protection but depends on the honesty of purpose of the person who makes the publication. If he is malicious, that is, if he uses the occasion for some other purpose than that for which the law gives protection, he will not be able to reply on the privilege, in order to succeed the plaintiff has to prove express malice on the part of the defendant broadly speaking, express malice means malice in the popular sense of or desire to injure the person who is defamed. To destroy the privilege, the desire to injure must be the dominant motive for the defamatory publication.

[14] Order 78 r 3 of the Rules of the High Court 1980 operates to make a mandatory requirement that if the plaintiff disputes the defence of privilege on the grounds of malice, the plaintiff must serve a reply giving particulars of the facts and matters from which malice is to be inferred. There are two reasons for this. Firstly, malice negates the defence of privilege. Secondly, since malice is an indirect fact, a finding of fact based upon inferences or conclusions from other facts that are indicative of malice, the particulars of such facts as are relied upon must be disclosed so as to *estop* the defendant from claiming he was taken by surprise, and seek the answer of malice to the defence to be dismissed since the burden of proof of malice is upon the plaintiff.

[15] The reason for such *estoppel* is that if the particular facts relied upon have not been set out, the defendant would have had no opportunity to verify the truth and accuracy of those particular facts, and if not true and correct, in what manner it is not true and not correctly stated.

[16] These steps are simple. To the impatient, they may be tedious. But it is a mistake to ignore them. It is a costly mistake since notice and opportunity to check and verify is central to the ability of procedure in civil litigation to ensure that the decision of the court is fair and just by making sure decisions are based upon facts:

(a) that are acknowledged by the parties to be true and correct; and

(b) where any fact is disputed, the finding of fact is made upon evidence that are acknowledged to be authentic or if disputed as to authenticity, upon evidence that has been disclosed, giving the other party opportunity to check and verify its authenticity, and therefore able to say whether the evidence may be admitted into evidence, or if he does not, the reasons why that evidence should not be admitted into evidence.

[17] It is the reasons why a piece of evidence should not be admitted into the body of evidence and to be taken into consideration that will determine if only submissions are necessary, or if it is necessary first for the trial judge to examine witnesses assisted by examination-in-chief, cross-examination and re-examination by counsel to present and test the witness, to determine whether the evidence of the witness is not unsafe to rely upon and the weight to be given, before proceeding to submissions and decision.

[18] It is a common error to overlook (a) disclosure of particulars of facts which would pre-empt argument of being taken by surprise and, therefore, not afforded the opportunity to answer; (b) checking and verification of disclosed particulars before trial to avoid unnecessary dispute and minimise trial time and costs; (c) disclosure of evidence relied upon in respect of disputed facts being pursued to pre-empt argument by the other party he had no opportunity to check and verify the evidence; and (d) checking and verifying evidence disclosed as to authenticity, reliability and accuracy. These steps are the litigants' and their counsel's best weapons to ensure that the decision of the court is as far as is humanly possible firmly based upon facts that they are satisfied with are true and correct, and if any fact is disputed, the finding of fact is made upon evidence that the parties are satisfied as to authenticity or found by the court to be authentic on the basis of consideration of submissions thereon by counsel who are fully prepared, and thereby ensure fair and just decisions by a process of reasoning rather than by unpredictable chance, choice, preference or belief.

[19] The plaintiff, in this case, had failed to file a reply to the statement of defence. He had failed to put together a plea of malice as an answer to the defence of privilege as required by O 78 r 3. Instead, the plaintiff makes do by reliance upon para 18 of the statement of claim, wherein he had alleged malice. The plaintiff relied upon *Luk Kai Lam v Sim Ai Leng* [1978] 1 MLJ 214; [1978] 1 LNS 110 (FC).

[20] Looking at para 18 of the statement of claim, it is clear that while the word malice was used, no particulars of facts relied upon from which a finding of malice may be inferred or concluded had been set out. There is no basis to distinguish *M Prabhkaran v Salam bin Seran* [2001] 6 MLJ 368; [2001] 3 CLJ 615 and *Abu Samah bin Omar v Zainal bin Montel* [2004] 5 MLJ 377; [2003] 1 LNS 501, or to apply *Luk Kai Lam v Sim Ai Leng*. The effect of O 78 r 3 is to require particulars of malice to be pleaded so that the truth and correctness of the particulars relied upon can be checked and verified.

[21] The court finds that the plaintiff has failed to invoke successfully malice as an answer to the defence of privilege.

[22] That is not to say that there is no need for the defendant to establish the defence of qualified privilege. But without the answer of malice being raised successfully, the complaint by the client of an advocate and solicitor to the Advocates & Solicitors Disciplinary Board, is not shown to be other than a privileged communication by a client with a grievance about the legal services he had been provided, ie a person who has an interest or a duty, legal, social or moral to make it to the body that has a corresponding interest or duty to receive it. See *Karthak v Damai* [1962] MLJ 423; [1962] 1 LNS 65.

[23] In this case, the complaint was dismissed by the Advocates & Solicitors Disciplinary Board. On 11 March 2005, the Advocates & Solicitors Disciplinary Board issued a letter as follows:

> The Disciplinary Board has considered your complaint against the above Respondent and has at its meeting held on Mar 5th, 2005 determined that there is no merit in your complaint. Accordingly, the Board has dismissed your complaint.
>
> You may, if dissatisfied with this decision of the Board, appeal to the High Court of Malaya within 30 days from the date of this notice.

[24] There is no assertion or evidence of an appeal from the decision of the Advocates & Solicitors Disciplinary Board. It was submitted for the defendants that even if the disciplinary board had dismissed the complaint made to it, this does not mean that the words mentioned therein are not justified because the very fact that the court in the S6–22–1191 of 2003 action made the order for account and subsequent orders to refund the money is sufficient proof the complaint to the Advocates & Solicitors Disciplinary Board is (a) not done with malice and (b) is justified.

[25] The issue here is whether the law recognises a cause of action in defamation in cases where a complaint made to a professional disciplinary authority is dismissed. The threat of litigation would intimidate persons with bona fide complaints from making a complaint, and deny the public their right of protection from unprofessional professionals. That is a far greater harm to the public interest than to professionals having to defend themselves in a disciplinary forum of their peers for the reason that that by taking up their profession they have not only offered to provide professional services to the public, but also submitted themselves to the authority of the disciplinary authority of their profession in respect of dissatisfaction. This court holds there is no cause of action in these instances where the complaint made is bona fide.

[26] In this case, there is evidence before the court of many requests made for information and accounts. The plaintiff has not shown he had answered each and every inquiry made by the client. The plaintiff had been tardy. Status reports were alleged to have been produced. The defendants submitted that

they had not seen these reports. There is no evidence produced before the court to show that these reports were delivered to the defendants at the material times to dismiss categorically those assertions. A bad taste remains. Closer examination show that the status reports now produced were for Ipoh, Penang and Alor Star, and do not address the locations and cases which are the subject of grievances in the defendants' complaint to the Advocates & Solicitors Disciplinary Board. It is not demonstrated the status reports were not incomplete. The defendants' outburst of complaint reflects the defendants' fears as a party, not only not convinced they kept informed but could feel the information was being kept from them. The plaintiff may feel or maintain it was excessive, but an objective view is that it was, in all the circumstances, not unreasonable. There is no evidence adduced of any other motive as would raise for consideration the principle in *Abdul Aziz bin Jelani & Anor v Peter Chua Swee Lai* [2000] 2 MLJ 462 (HC) where KC Vohrah J held:

> The defamer is entitled to the protection of privilege if he can prove the positive belief or honest belief in the truth of what he published. In the present case, the court found that the defendants in publishing the defamatory statement did not believe the statement to be true. They merely wanted the assistance of the police to get the plaintiff to explain to them the receipt, it was a misuse of the process conclusive evidence of express malice on the part of the defendants. The defence of privilege was properly rejected by the sessions court.

[27] Other than that the complaint was dismissed, there is no evidence put before the court to suggest the defendants did not believe their own complaint and was misusing the complaint procedure to the Advocates & Solicitors Disciplinary Board for any other ulterior motive. The court concludes that the complaint to the Advocates & Solicitors Disciplinary Board remained bona fide at the time it was made, and provides no cause of action by its dismissal.

[28] Further, the court finds that even though the plaintiff now admits he is keeping the sum of RM227,137.93 of the first defendant's money, the plaintiff had not disclosed he had the sum at any time prior to and even before the Advocates & Solicitors Disciplinary Board.

[29] In the event, the court holds the defendants did have a bona fide grievance at the time the letter of termination and the letter of complaint were issued.

[30] In the light of the above, it is unnecessary to consider the defence of justification.

[31] The plaintiff's claim is dismissed with costs.

Plaintiff's action dismissed with costs.

Reported by Andrew Christopher Simon